

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 24, 2007

STATE OF TENNESSEE v. JAMES DANIEL BIRD, II

Direct Appeal from the Criminal Court for Sullivan County
No. S51, 434 R. Jerry Beck, Judge

No. E2006-02673-CCA-R3-CD - Filed October 3, 2007

The defendant, James Daniel Bird, II, was convicted in April of 2006 of two counts of aggravated rape, and one count each of especially aggravated kidnapping, aggravated robbery, and aggravated burglary. The defendant was sentenced consecutively on each charge for a total effective sentence of 111 years. On appeal, the defendant raised two issues for review: (1) whether the evidence contained in the record was sufficient as a matter of law to sustain the convictions; and (2) whether the trial court erred by enhancing the defendant's sentences above the minimum within each range of each count and by setting each sentence to run consecutively. Upon review of the full record and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Larry Dillow, Kingsport, Tennessee, for the appellant, James Daniel Bird, II.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

The following evidence was presented at trial. Donald Naille, a corrections officer with the Northwest Correctional Facility, testified that he supervised a prisoner work crew from the Carter County Work Annex. The crew's assignments generally entailed work at the Warrior's Path State Park. On November 9, 2005, the defendant was placed on Officer Donald's work crew and assigned the task of stacking wood under the maintenance shed. Officer Naille recalled that as part of his duties as supervisor, he performed a head count of the prisoners every fifteen minutes. He also noted

that the prisoners were prohibited from having any contact with civilians. According to Officer Naille, he conducted a head count about five to ten minutes after the defendant took a restroom break and discovered the defendant missing. Officer Naille checked the restroom and subsequently called in a code two escape when he was unable to locate the defendant. At that time, Officer Naille searched the office and noticed that a knife from the office was missing.

Barbara Hackett testified that she lived in a home she shared with her husband and two sons in a subdivision near Warrior's Path State Park. On November 9, 2005, at approximately 9:30 a.m., Mrs. Hackett was working at home when she heard someone knocking on her front door. When she went to the door, she saw a man standing there with a knife in his hand. The defendant told her his car had broken down and he needed to call someone. He then opened the door and entered uninvited and without consent. The defendant grabbed Mrs. Hackett from behind, placed his knife at her throat and instructed her not to do anything.

Mrs. Hackett testified she told the defendant that she did not have any money, and also told him that her husband would be returning home soon. The defendant walked her down the hallway to the bedroom with the knife at her back and forced her onto the bed, face down on her stomach. He cut the cord off a nearby lamp, bound her hands, then took her pajamas, ripped them into strips, and bound her legs.

Mrs. Hackett testified that the defendant pulled her pants down and penetrated her anus with a "fleshy object." Thereafter, he turned her onto her back and told her, "I haven't had p**** for a long time. I think I'll get me some." The defendant put his penis into her vagina and raped her. Throughout the entire attack, the defendant talked incessantly and asked her questions about her family, her home, and children. After the rape, the defendant gagged Mrs. Hackett with a washcloth and belt and then forced her to crawl on her knees to the closet, which he closed behind her and barricaded.

Mrs. Hackett testified that while confined in the closet, she heard the defendant rifling through her home office, and at one point the defendant called out to her, asking, "Where are the keys to the car? Where are the keys to the car?" She did not answer, and stayed in the closet about an hour total. About ten to fifteen minutes after the house grew quiet, she loosened the cord around her fingers, escaped from the closet, and immediately called 9-1-1. Shortly thereafter, both her husband and police officers arrived at the house.

Mrs. Hackett testified that after her escape, she noticed that her cell phone, keys, and wallet had been taken. However, she did not realize her car had been taken until after her husband arrived on the scene. According to Mrs. Hackett, she was taken by ambulance to nearby Holston Valley Hospital and treated for injuries to her hands, wrists, and ankles. Under the supervision of a female detective, a rape kit analysis was performed by medical personnel. While at the hospital, Mrs. Hackett was asked to review a photographic array. Mrs. Hackett circled and initialed a picture of the defendant out of all of the photographs she was shown. At trial, she testified that she was able to identify the defendant "without any doubt."

Dr. Linda Odom treated Mrs. Hackett at the hospital and testified at trial regarding her physical examination and treatment of the victim. During her exam of Mrs. Hackett, she noted the marks around Mrs. Hackett's wrists and ankles, and noted that her hands and feet were swollen. Dr. Odom also treated a laceration on Mrs. Hackett's right index finger. When she performed a vaginal exam, she found blood in her vagina, along with a "large amount of clear whitish fluid within the vaginal vault." The results of the exam indicated to Dr. Odom that there had been traumatic sexual intercourse. Dr. Odom swabbed the anus and vagina to take samples of both areas, and the swabs from the rape kit were placed in a sealed container, along with Mrs. Hackett's blood sample, and turned over to law enforcement officers.

Sullivan County Detective Tommy Arnold testified that investigators searched the Hacketts' home for evidence. Detective Arnold found a lamp with a cord cut off in the bedroom. After learning that Mrs. Hackett's vehicle was missing, Detective Arnold issued a "Be On the Look Out" (BOLO) alert with the vehicle's description. The defendant was subsequently apprehended in Shreveport, Louisiana by the Shreveport Police Department. Detective Arnold was contacted and traveled to Shreveport to interrogate the defendant and take him into custody. The defendant waived his *Miranda* rights and made a recorded statement to Detective Arnold about his escape and the assault on Mrs. Hackett.

Detective Arnold testified at trial that the defendant's initial confession did not include details of the sexual assault and rape against Mrs. Hackett, and it did not reveal the fact that the defendant and Mrs. Hackett had any type of prior relationship. Detective Arnold recounted that he confronted the defendant with the accusations of sexual assault. The defendant told him that Mrs. Hackett said she could "give him love." The defendant also stated that he pulled her pants down, and "f****d her." According to Detective Arnold, the defendant made a second statement in which he indicated that it was only after intercourse that he cut the lamp cord and bound Hackett's wrists.

Detective Arnold recalled that after reading the statement, the defendant initialed it to indicate its accuracy. Detective Arnold also recalled that he executed a search of the car stolen from Mrs. Hackett and found a knife under the driver's seat.

Special Agent Bradley Everett of the Tennessee Bureau of Investigation testified at trial that he is a forensic scientist involved in DNA identification and serology. Special Agent Everett analyzed the samples from the rape kit provided by Mrs. Hackett and compared those results with the defendant's blood sample. According to Special Agent Everett, both samples taken from Mrs. Hackett contained sperm, and the DNA from the sperm matched the DNA from the defendant's blood sample.

The defendant testified at trial in his own defense. The defendant told the jury that he began a "pen pal" correspondence relationship with Mrs. Hackett while he was incarcerated in the Whiteville Correctional Facility. They corresponded for roughly four to five months before he was transferred to the Northeast Tennessee State Penitentiary. According to the defendant, it was Mrs. Hackett's idea to see if he could get on the work detail which serviced Warrior's Path State Park.

The defendant further testified that Mrs. Hackett visited him several times while he worked at the park and brought him lunch. He recounted that after two or three meetings in the park, they began meeting in her home where she provided him with poems, burned music CDs for him, and eventually engaged in a consensual sexual relationship.

The defendant testified that he and Mrs. Hackett made plans to run away to Florida together on Friday, November 11, 2005. However, on Monday of that week, he was told by his supervisor that the work crew would not be working on Thursday or Friday. Therefore, the defendant determined that he had no choice but to escape on Wednesday, the 9th. When the defendant escaped and arrived at the Hacketts' home, he claimed Mrs. Hackett told him she "wasn't ready." According to the defendant, the two once again engaged in consensual sex which did not include anal sex. The defendant stated that it was her idea for him to tie her up, place her into the closet, and take her wallet and car.

The defendant testified that he escaped and traveled to Florida, and then to Shreveport, Louisiana where he was later arrested. The defendant stated that he gave a half-truthful statement to Detective Arnold in order to protect Mrs. Hackett because he did not "want her to get into any trouble." When confronted about the rape and kidnapping charge, the defendant told Detective Arnold that "it blew my mind, because me and [Mrs. Hackett] had said nothing in regard to that." The defendant claimed that Mrs. Hackett had voluntarily permitted him to tie her hands with the cord and secure her legs with the torn pajama strips. The defendant further alleged that Mrs. Hackett had sent him letters, but that all of her letters had been confiscated by prison officials. When the defendant was confronted on cross-examination about the one letter he produced at trial with the name Barbara written over the name Pauletta, he was unable to explain how that had occurred.

Justin Kevin Hoskins testified on the defendant's behalf. According to Hoskins, he and the defendant had been incarcerated together and had served together on the work crew at the state park. He testified that the defendant would leave the detail frequently for forty-minutes to an hour, and claimed that the defendant had shown him letters from his "girlfriend" Barbara. On cross and re-cross examination, Hoskins admitted that he and the defendant rarely worked together in the same location, that he did not even work with the defendant during some of the dates in question, and that his recollection of the relationship between the defendant and "Barbara" as he referred to her, was based almost entirely on what he had been told by the defendant.

Mrs. Hackett was called again as a rebuttal witness and testified that she had never seen the defendant before the attack on November 9th. The jury deliberated and returned a guilty verdict against the defendant for each and every count charged in the indictment, except escape, to which the defendant pled guilty prior to trial.

On September 7, 2006, the trial court held a sentencing hearing, and the defendant was sentenced to the following: for two counts of aggravated rape, Class A felonies, the defendant received twenty-five years at 100% and a \$50,000 fine for each count; for one count of especially aggravated kidnapping, a Class A felony, the defendant received twenty-five years at 100% and a

\$50,000 fine; for one count of aggravated burglary, a Class C felony, the defendant received fifteen years at 45% and a \$10,000 fine; for one count of aggravated robbery, a Class C felony, the defendant received fifteen years at 45% and a fine of \$25,000; and for the count of escape, a Class E felony, to which the defendant pled guilty prior to trial, the defendant received six years at 60%. The court ordered that each conviction run consecutively to every other conviction, giving the defendant a total sentence of 111 years.

On October 12, 2006, the trial court held another sentencing hearing after it found that it had erred in the initial sentencing hearing by assuming that the minimum sentence for Class A felonies under the 2005 amendments to the 1989 Sentencing Act was still the midpoint in the range. As part of the 2005 amendments, the statute was amended to read that with regard to sentencing of any felony, the trial court is to begin with the minimum sentence in the range and then adjust as appropriate for enhancement and mitigating factors. The court also corrected a clerical error related to the defendant's aggravated robbery conviction.

At the re-sentencing hearing, the trial court reclassified the defendant as a multiple, rather than persistent offender. The trial court then imposed a sentence of fifteen years, the same sentence it handed down under the previous classification. After correcting the sentences, the defendant remained sentenced to 111 years. The trial court maintained its decision that each sentence run consecutively to every other sentence.

ANALYSIS

I. Sufficiency of the Evidence

On appeal, the defendant argues that the evidence presented at trial is insufficient to support the jury verdict and sustain a conviction for any of the charged offenses.

Upon review, we recognize the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); *see also* Tenn. R. App. P. 13(e). The jury's verdict, once approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

In this case, the jury evaluated the testimony of the victim and the defendant and determined that the defendant was not credible. Hackett testified that she did not know the defendant, that the defendant entered her home at knife point, forced her into her bedroom, bound her feet and hands and raped her repeatedly. The defendant then forced her to crawl on her knees into the closet, barricaded it, stole her keys, wallet, cell phone, and car and made his escape. In addition, the jury credited the testimony of corroborating witnesses including police officers and medical personnel who all testified that Mrs. Hackett was tearful and distraught at the scene and at the hospital, and who saw firsthand the strips of cloth tied to her ankles, the electrical cord around her wrists, and the belt and dish towel gag around her neck. Furthermore, the DNA evidence supported the victim's testimony, as did findings of forced sexual intercourse related to the jury by analysis of the rape kit. Mrs. Hackett was also able to identify the defendant from a photographic array immediately following the incident.

In addition, the statement given by the defendant to police at the time of his capture initially corroborated Mrs. Hackett's testimony as well. In this statement, he admitted entering the house, forcing Mrs. Hackett at knife point, tying her up, barricading her in the closet, and stealing her car. It was not until his subsequent testimony at trial that the defendant maintained that he and victim had been engaged in an ongoing, consensual, sexual relationship. The jury did not find this version of events credible or believable. The letter allegedly written by Mrs. Hackett to the defendant clearly bore an altered signature. A fellow work crew inmate, the defendant's lone corroborating witness, was discredited on the stand. All of the evidence presented at trial was considered and evaluated by the jury. Therefore, we conclude that the evidence in this case was clearly sufficient to support the convictions of each separate count for which the defendant was charged. The defendant is not entitled to relief on this issue.

II. Sentencing

The defendant was initially sentenced on September 7, 2006, and then re-sentenced on October 12, 2006 for all of his convictions, including the guilty plea he entered into on the escape charge prior to trial. The defendant argues that the trial court abused its discretion by sentencing the defendant beyond the minimum presumptive sentence on each and every conviction, and by imposing consecutive sentencing on all of his convictions.

A. Sentencing Enhancement

The defendant argues that the trial court erred by sentencing him beyond the presumptive minimum term in each felony class in which he was convicted.

When a defendant challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2006); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative

showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Ashby*, 823 S.W.2d at 169. When conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Carico*, 968 S.W.2d 280 (Tenn. 1998)). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

We note that the defendant has failed to present any argument as to why the trial court erred in enhancing his sentence beyond the presumptive minimum. “Issues which are not support by argument, citation to authorities, or appropriate references to the record will be treated as waived . . .” Tenn. Ct. Crim. App. R. 10(b); *see* Tenn. R. App. P. 27(a)(7). Even if the defendant had not waived this argument, he is not entitled to relief. The record reflects that the trial court properly enhanced the defendant’s sentences beyond the presumptive minimum based on provisions of Tennessee Code Annotated section 40-35-114. The portions of that statute applied by the court are as follows:

If appropriate from the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant’s sentence:

- (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
- (7) The offense involved a victim and was committed to gratify the defendant’s desire for pleasure or excitement;
- (8) The defendant, before trial or sentencing, has failed to comply with the conditions of a sentence involving release into the community;
- (13) At the time the felony was committed, one of the following classifications was applicable to the defendant:
 - (H) on escape status;

Tenn. Code Ann. §§ 40-35-114(1), -(7), -(8), -(13)(H).

From a review of the record, it is clear that the court considered the enhancement factors listed above in its consideration of whether or not to impose sentencing terms beyond the presumptive minimum for each conviction. In the defendant’s second sentencing hearing on October 12, 2006, the trial court started over with the presumptive minimum term for each felony and sentenced the defendant to maximum term of twenty-five years on each of the defendant’s Class A felonies - two counts of aggravated rape and one count of especially aggravated kidnapping. We

note that the trial court followed the statutory guidelines and based its decisions upon the evidence, the nature of the criminal conduct involved, its findings in the pre-sentence reports, consideration of enhancement factors and the absence of any mitigating factors. All other sentences originally imposed at the September 7, 2006 hearing remained valid. We do not find that the trial court abused its discretion in instituting any of the sentences that the defendant received. In this case, the record reflects that the trial court did not err in sentencing the defendant in accordance with sentencing guidelines and within the appropriate range on each and every count. The defendant is not entitled to relief on this issue.

B. Consecutive Sentencing

As his final issue, the defendant challenges the trial court's imposition of consecutive sentencing.

A trial court may impose consecutive sentencing upon a determination by a preponderance of the evidence that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exist. A trial court may impose consecutive sentencing if it determines any one of the following criteria applies:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of his livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person . . . ;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . . ;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. §40-35-115(b).

Only one of the enumerated criteria needs to be found by the court to support the imposition of consecutive sentencing. *State v. Ernest Leon Powers, Jr.*, No. 03C01-9606-CC-00222, 1997 WL 665986, at *9 (Tenn. Crim. App., Knoxville, Oct. 28, 1997). In this case, the trial court found that two criteria existed to justify the imposition of consecutive sentencing. First, the court found that under 115(b)(2), the defendant was an offender whose record of criminal activity is extensive, and second, under 115(b)(4), the defendant was a dangerous offender whose behavior indicated no regard for human life, and no hesitation about committing a crime in which the risk to human life is high. We will address the court's findings in reverse order.

If the trial court imposes consecutive sentencing based upon a finding that the defendant is a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4), the court must also determine whether the sentences imposed are reasonably related to the severity of the offenses and necessary to protect the public from further criminal activity by the defendant. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). Additionally, “[i]n order to limit the use of the ‘dangerous offender’ category to cases where such ‘particular facts’ exist, this Court held that sentencing courts must make specific findings regarding the severity of the offenses and the necessity to protect society before ordering consecutive sentencing under Tenn. Code Ann. § 40-35-115(b)(4).” *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999). The state concedes that the trial court did not make such a finding. Upon review of the record, we agree that while the trial court applied Tenn. Code Ann. § 40-35-115(b)(4) as a justification for consecutive sentencing, it erred by failing to make a finding on the record that either of the *Wilkerson* factors had been met to justify consecutive sentencing on this basis.

However, the record reflects that the trial court did find sufficient basis to impose consecutive sentencing based on the defendant’s “extensive criminal history,” under Tennessee Code Annotated section 40-35-115(b)(2). The court considered the defendant’s prior criminal record, which included prior felony convictions for theft over \$1000 and forgery, as well as misdemeanor convictions for theft under \$500, and unauthorized use of a motor vehicle. The defendant also had at least three juvenile infractions and was cited for a number of disciplinary actions while incarcerated, including assaults, sexual misconduct, possession of gang material, and possession of contraband. In addition, the trial court also considered the six counts of which he was convicted in the present case as contributing to a “record of criminal activity [which] is extensive.” Tenn. Code Ann. § 40-35-115(b)(2); *See State v. Palmer*, 10 S.W.3d 638, 647 (Tenn. 1999) (finding that a defendant’s present convictions arising out of a “single incident” could be considered when imposing consecutive sentencing under Tenn. Code Ann. § 40-35-115(b)(2)).

In light of the multiplicity of the defendant’s criminal behavior, including his prior convictions, disciplinary actions during incarceration, and present offenses, we conclude the court acted within its discretion in imposing consecutive sentences based on the defendant’s “extensive” criminal activity. Tenn. Code Ann. § 40-35-115(b)(2); *see State v. Bobby Blair*, No. M2002-02376-CCA-R3-CD, 2003 WL 22888924, at *3 (Tenn. Crim. App., at Nashville, Dec. 5, 2003), *perm. app. denied* (Tenn. May 17, 2004) (noting that 40-35-115(b)(2) applies to both the extensive nature of the defendant’s present convictions and the defendant’s history of criminal activity); *see also State v. Palmer*, 10 S.W.3d 638, 647 (Tenn. 1999). The defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE